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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/577,428	08/14/2006	Patrice Richard	Q94528	4756
23373	7590	11/03/2009	EXAMINER	
SUGHRUE MION, PLLC 2100 PENNSYLVANIA AVENUE, N.W. SUITE 800 WASHINGTON, DC 20037			EISEMAN, ADAM JARED	
			ART UNIT	PAPER NUMBER
			3736	
			MAIL DATE	DELIVERY MODE
			11/03/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

***Advisory Action
Before the Filing of an Appeal Brief***

Application No.

10/577,428

Applicant(s)

RICHARD ET AL.

Examiner

ADAM J. EISEMAN

Art Unit

3736

–The MAILING DATE of this communication appears on the cover sheet with the correspondence address –

THE REPLY FILED 20 October 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: _____.

Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: The applicant's arguments/remarks have been fully considered but are found to be non-persuasive. The applicant argues that Tversky's detent for holding a protective sheath in an open or closed position in regards to apertures teaches away from the Sutton reference. They argue that Sutton requires that the inner cannula and outer cannula must be movable and that the Tversky detent mechanism would inhibit this movement. The examiner disagrees with the applicant's argument because the modification of the Sutton reference to include the Tversky detent mechanism does not prevent movement of the inner and outer cannula, but would rather provide for selective assured movement from open and closed positions of select apertures. Sutton's device allows for the closing of the apertures by disalignment of the inner cannula aperture and outer cannula aperture. By modifying Sutton with Tversky's detent mechanism, it does not prevent realignment of Sutton's apertures, but rather provides selective alignment and disalignment of the apertures in selectively locked positions.

The applicant further argues that there is no motivation for modifying Sutton by Tversky as they belong in different technical fields of invention. The examiner finds the argument non-persuasive as both inventions relate to a device for insertion into a body, consisting of an inner body and outer body wherein the outer body is movable to align and disalign apertures of the inner and outer body. Although one is for injecting and extracting in surgery and one is for opening and closing sensor windows, they both provide the special technical features of aligning and disaligning inner and outer windows/apertures on inner and outer bodies.

Finally, the applicant argues that Shapira does not teach a mixing chamber in the device because the irrigation fluid is delivered into the bone. The examiner disagrees with the applicant's argument. Shapira claims that the irrigation fluid is passed to the "extraction site". The examiner interprets the extraction site as the location where the device and bone meet. If one where to look at figure

/Max Hindenburg/
Supervisory Patent Examiner, Art Unit 3736

/A. J. E./
Examiner, Art Unit 3736